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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 624

CAPE ANN GRANITE COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Cape Ann Granite Company, Inc., prays that a writ of *certiorari* issue to review the proceedings and judgment of the Court of Claims of the United States, entered on October 4, 1943, which dismissed the complaint herein. The Court of Claims entertained a motion by the petitioner for a new trial and filed its order overruling the motion for a new trial on November 1, 1943.

This is an action to recover on *quantum meruit* for materials supplied and services rendered by the petitioner to the U. S. Army Engineer Corps in repairing two jetties

composing the breakwater at the mouth of the Merrimack River at Newburyport, Massachusetts. The petitioner asks for the difference between the value received by the Government from it and the smaller amount paid to the petitioner by the Government.

The Government accepted the finished work. The petitioner completed the job within a reasonable time after the Government changed certain plans and specifications (R. 102, 103, 108, 109),* but several months after the original contract completion date, during which extended period the petitioner maintained an expensive marine plant on the job.

The Court of Claims held that the Government breached the contract (R. 37), but deprived the petitioner of the remedy it elected—recovery on *quantum meruit*. It further erroneously held that the Government properly withheld $25 per day penalty for 227 days—$5,675 (R. 36).

The Facts.

The facts material for the consideration of the questions of law raised herein are as follows:

Prior to the 11th day of October, 1935, the petitioner filed with the U. S. Army Engineer Corps at Boston, Massachusetts, a formal bid to repair the north and south jetties of the breakwater at the mouth of the Merrimack River, Newburyport, Massachusetts, by supplying and placing heavy granite blocks in position on the jetties.

A standard Form of Government Construction Contract was entered into on October 11, 1935 (R. 5, 110), and was approved by the Chief of Engineers on November 4, 1935 (R. 115). The work was to be completed within 365 days after receipt of notice to proceed (R. 110), excluding the

* Record references higher than (R. 40) refer to paging of unprinted record.

months of January and February in each year and such extensions as the contracting officer might permit (R. 117, 111, 113, 119).

Notice to proceed was given to the petitioner on November 7, 1935 (R. 120). This fixed the completion date as March 5, 1937 (R. 148). The petitioner commenced operations under the contract on November 8, 1935 (R. 82, 121). The contract granted the petitioner a period of 20 calendar days from the receipt of notice to proceed within which to commence operations (R. 110); but such 20 days were included in the 365 performance days.

On November 15th, 1935, the contracting officer duly granted the petitioner permission to suspend operations until April 1, 1936, because of "unsuitable weather conditions" (R. 121), pursuant to a contract provision that extensions of performance time might be granted by the contracting officer because of unusually severe weather (R. 119). In March, 1936, a disastrous flood occurred in the Merrimack River which, according to Government reports, caused changes in subsurface conditions affecting operations (R. 65, 83, 84, 159).

During the progress of the work, the petitioner's operations at the site were also greatly impeded because of unusually severe weather, combined with sea and unforeseeable current conditions (R. 117, 60, 61, 66, 76, 78, 89, 90, 102) and it made a number of applications to the contracting officer for extensions of time for performance. The contracting officer promised repeatedly to ascertain the facts and act on the applications (R. 107, 122, 131), as the contract required (R. 111), but failed to do so before all the work under the contract had been finished and the job had been accepted by the Government (R. 36).

In the early spring of 1937, the Government inspector assigned to the job (R. 101) informed the petitioner's superintendent on the job that the contracting officer intended,

and was preparing, to amend the plans and specifications for the size and shape of the mounds at the seaward ends of the jetties (R. 71, 104, 105). The mounds were large masses of heavy granite blocks intended to protect the ends of the jetties from the action of the sea (R. 64).

On September 22, 1937, the contracting officer issued Change Order No. 1, modifying the size and shape of the mounds, which the petitioner accepted and proceeded to put into execution (R. 72, 74, 108, 109). The change was an advantage to the Government (R. 108) and a detriment to the petitioner (R. 74, 75) which received no consideration therefor and was put to added expense and trouble (R. 75). The job was completed and accepted by the Government on December 22, 1937 (R. 148). The last work performed was done on the mounds (R. 74).

Although the Change Order was not issued until September 22, 1937, the contracting officer made deductions for delay (R. 113, 117) at the rate of $25 per day from March 5, 1937, to December 22, 1937, amounting to $7300 (R. 148). A payment which the Government styled "final" payment under the contract was made to the petitioner in January, 1938, and accepted by it under protest (R. 148).

Thereafter the petitioner made demand upon the contracting officer (a) for performance of his promises to investigate and adjust for unavoidable delays; (b) for additional compensation because (1) of changed conditions at the site and (2) of material misrepresentations of fact in the specifications; and (c) for the return of the $7300 withheld (R. 132-143).

The specifications represented (1) that the average current at the site was 2.1 miles per hour and (2) that there were no obstructions between the site of the work and the sea (R. 117).

The petitioner claimed (1) that the average current at the site ran between 3½ and 4 miles per hour (R. 139), and

prevented it from mooring at the site or moving its floating equipment from the site except during the slack water between tides, with consequent great delay in operations; (2) that the entrance to the river was obstructed by a shifting sandbar (R. 139) which could not be crossed except during the last three hours of the flood tide and then only with a calm sea, and (3) that a serious flood in the Merrimack River during March, 1936, had changed conditions—according to official Government notices—and caused a shoaling of the bar to about 4 feet at mean low water (R. 136-138).

On December 29, 1938, the contracting officer notified the petitioner (R. 144-147) that pursuant to his findings dated December 9, 1938, (a copy of which was later on furnished the petitioner) its claim was denied, with the exception that $1625—representing 65 days' deductions—should be refunded because of the extension of November 15, 1935 (R. 121, 148-159).

These findings of fact by the contracting officer, who was in default under the contract, were wholly *ex parte*, whereby the petitioner was deprived of a fair hearing and was denied its day in court. Within 30 days thereafter, the petitioner duly appealed to the Secretary of War (R. 31, 36) from the decision and findings of the contracting officer, pursuant to Article 15 of the contract (R. 114). Under the contract the decision of the Secretary of War only was to be final and conclusive upon the parties in the event of appeal.

The Secretary of War refused to act upon the petitioner's appeal (R. 36) on the ground that "final" payment had been made; and referred the matter to the General Accounting Office. The latter, in August, 1939, made the allowance of $1625 above mentioned which was thereupon paid the petitioner and received under protest. This action was commenced in the Court of Claims on September 29, 1939 (R. 1).

The Court of Claims based its findings (1) that conditions at the site had not been changed by the flood of March, 1936, and (2) that the weather was not unusually severe, upon these findings of the contracting officer (R. 32, 33, 37), unsupported by any evidence and contrary to the uncontradicted evidence in the record (R. 72, 73, 159).

This action of the Court of Claims was particularly arbitrary and capricious because the contracting officer was an interested party to the dispute in that he was in default in failing to make the prompt investigations and decisions required by the contract (R. 36) and was interested in establishing that his defaults under Articles 4 and 9 of the contract did not in fact affect the petitioner. His finding of no change in conditions was in direct conflict with contemporaneous reports of changed conditions made by his own office (R. 93) and appearing in official notices to mariners introduced in the Record (R. 84, 159).

The Court of Claims also arbitrarily and capriciously found, without any evidence in support thereof, that the average current at the site was but 2.08 miles per hour throughout the tidal cycle (R. 22, 35, 47); and notwithstanding the unanimous, uncontradicted evidence that the average current substantially exceeded 3 miles per hour (R. 60, 61, 66, 76, 78, 89, 90, 102) in full support of the petitioner's claim of material misrepresentation of fact by the Government in the specifications.

The Court of Claims also declined to make any finding that Change Order No. 1 had been issued nor of its contents although there was no dispute as to its issuance and its terms and the petitioner specifically requested such a finding in its motion for a new trial (R. 16).

The Court of Claims held that the United States had breached the contract by failing to perform its duty of making decisions and that the petitioner had the right to

sue on the contract (R. 37), but denied the petitioner its right of recovery under *quantum meruit*.

The petitioner was thus arbitrarily deprived of its right of election of remedies.

Questions Presented.

1. Is not one who contracts with the Government entitled to his "day in court" and a fair hearing before a departmental officer, including a fair opportunity to offer evidence, cross-examine and oppose proffers of evidence, when the contract merely provides that the contracting officer shall, in case of dispute, decide questions of fact, subject to conclusive determination by the head of the department upon appeal?

2. As due process under the contract, does not its provision for an appeal to the head of the department require a record of a hearing before the contracting officer with which to test his findings?

3. Has not the petitioner been deprived of its property without due process of law in violation of the Fifth Amendment of the Constitution by the denial of recovery in *quantum meruit* after the Court held the Government had breached the contract?

4. Was not the petitioner denied due process of law when the Court of Claims based its adverse judgment upon *ex parte* findings of fact made without any hearing by the contracting officer, an interested party to the dispute involved, from which findings the petitioner had duly appealed and which were not affirmed by the appellate authority?

5. Was not the petitioner denied due process of law when the Court of Claims based its adverse judgment upon findings of facts (as to current velocity) made without any evidentiary support in the record?

6. Has not the petitioner been denied due process of law in that the Court of Claims refused to give any effect to Change Order No. 1 with respect to deduction of penalty for alleged delay in performance; and refused to make a finding of the undisputed facts concerning its issuance and terms?

Proceedings in the Lower Court.

The petitioner filed its petition in the Court of Claims on September 29, 1939. The Government filed its general traverse on October 13, 1939. The evidence was introduced before Commissioners Church and Gordon and was concluded on November 28, 1941. The Report of Commissioner was made by Commissioner Evans and was filed October 19, 1942. The petitioner filed Exceptions to the Commissioner's Report on November 17, 1942. The Government filed Exceptions to the Commissioner's Report and Request for Special Findings on November 27, 1942. The petitioner filed its Request for Special Findings and Brief on December 7, 1942. The Government filed its Request for Special Findings of Facts and Brief on February 15, 1943. The case was tried to the Court on April 7, 1943. On June 7, 1943, the Court filed its Special Finding of Facts and Opinion granting judgment to the petitioner in the sum of $250. The petitioner filed its motion for a new trial on July 31, 1943. The Court, on October 4, 1943, overruled the petitioner's motion for a new trial and, on its own motion, vacated and withdrew the Special Findings of Fact, Conclusion of law and opinion filed June 7, 1943, and filed new Special Findings of Fact and conclusion of law dismissing the petition and entering judgment in favor of the United States with opinion by Judge Whitaker. The petitioner moved on October 20, 1943, for leave to file a second motion for a new trial. The motion was allowed on October 27, 1943, and petitioner's second motion for new

trial was filed the same day. The Court overruled the motion on November 1, 1943.

Assignments of Error.

The errors which the petitioner urges as grounds for granting a writ of certiorari and for reversing the judgment of the Court of Claims are:

1. The Court denied the petitioner due process of law.

2. The Court failed to grant recovery to the petitioner in *quantum meruit* upon the Government's established breach of the contract.

3. The Court's findings as to whether conditions and changed subsurface and latent conditions were made without substantial evidence to sustain them but solely upon *ex parte* findings by the contracting officer, an interested party, from which the petitioner had appealed as provided by the contract, and which were not affirmed by the appellate authority.

4. The Court based its judgment in material respects upon findings of fact as to current velocities, which it made without any substantial supporting evidence, but contrary to the evidence.

5. The Court failed to give effect to Change Order No. 1, issued more than six months after the completion date fixed by the contract or to find the undisputed facts as to its issuance and terms although expressly requested by the petitioner to do so.

6. The Court held that deduction of penalty for 227 days' alleged delay was properly withheld from the petitioner.

Reasons for Granting the Writ.

1. This case presents important questions in the interpretation of the Standard Form of Government Construc-

tion Contract. (*United States* v. *Brooks Callaway Co.*, 318 U. S. 120, 122.)

2. In view of the prevalent general practice to include in government contracts provisions for the determination of facts in dispute by an administrative officer, it is of general public importance that this Court settle whether the federal law requiring a fair hearing before administrative boards as defined in the case of *Interstate Commerce Commission* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91, shall apply to Government officials empowered by such contracts to determine the facts involved in disputes arising under them, and thus provide due process of law.

3. The Court of Claims has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of its power of supervision by this Court with respect to the following:

A. Its adoption of the contracting officer's findings of fact which were not binding upon the petitioner—even if the contract were not rescinded for breach by the Government—sets a wrong precedent and invades the petitioner's right to due process.

B. Its refusal to grant recovery in *quantum meruit* after holding that the Government breached the contract is in conflict with the decisions of this Court in the cases of *Clark* v. *U. S.*, 95 U. S. 539, 542, 543; *U. S.* v. *Behan*, 110 U. S. 338, 345, 347; and *Ankeny* v. *Clark*, 148 U. S. 345, 353; and with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Kneberg* v. *Green Co.*, 89 F. (2d) 100, 104, and deprives the petitioner of the benefit of its elected remedy.

C. Its refusal to give any effect to Change Order No. 1 whereby the Government was partly, if not wholly, responsible for the delay in completion of the work, conflicts with

the ruling of this Court in the case of *United States* v. *United Engineering & Contracting Co.*, 234 U. S. 236, 243; and with a long line of prior decisions in the Court of Claims from *Ittner* v. *U. S.*, 43 C. Cls. 336, 351; to *Camp Sales Corp.* v. *U. S.*, 77 C. Cls. 659, 664.

D. Its finding as to average current velocity, upon the issue of misrepresentation of facts, was contrary to the indisputable character of the evidence (*Int. Com. Comm.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91).

WHEREFORE, it is respectfully submitted that this petition should be granted.

CAPE ANN GRANITE CO., INC.

HORACE M. GRAY,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

HORACE M. GRAY,
Counsel for Petitioner.